

## **Net Zero Legislative Project: possible work in UNCITRAL**

### **Stocktaking Climate Change Mitigation & Adaptation Objectives in Modern Trade Law**

The UN system leads global efforts to combat climate change.

The 1992 UN Framework Convention on Climate Change (“UNFCCC”) and 2015 Paris Agreement seek to reduce greenhouse gas emissions and improve the ability of States to adapt to climate change. UN Sustainable Development Goal (“SDG”) 13 requires urgent action to combat climate change and its impacts, including integration of climate change measures into national policies, strategies and planning, and strengthening resilience and adaptation. The 2015 Adoption of the Paris Agreement draft decision, Articles 134 to 135, welcomes private sector and financial institution efforts, inviting all stakeholders to scale up efforts and support actions to reduce emissions, build resilience and decrease vulnerability.

UNCITRAL, as the core legal body of the UN system in the field of international trade law, aims to harmonize and modernize this field of law, by preparing and promoting legislative and non-legislative legal texts, and by increasing coordination of and cooperation on legal activities of international and regional organizations active in the field. It thus seeks to promote the rule of law at the national and international levels.

Public and private investment in mitigation – transitioning global energy, infrastructure, industrial and land use systems to net zero emissions by 2050 – adaptation and resilience is governed by international trade law instruments. UNCITRAL’s system of rules, contractual texts and explanatory guides, provides tools through which to achieve climate goals globally, in a just and fair way that benefits all states equally and all investors, regardless of their nationality or resources.

The proposed project would examine whether or not UNCITRAL’s existing rules align with climate change mitigation, adaptation and resilience goals and what more they can do to facilitate them, by:

1. stocktaking existing UNCITRAL texts and working documents to identify whether and how these might better facilitate or accelerate the Paris Agreement goals of climate change mitigation, adaptation, resilience, financing and technology sharing; and
2. identifying areas where UNCITRAL might innovate to offer new tools either within those existing texts and working documents or in addition.

The focus would be on UNCITRAL rules, contractual texts and explanatory texts, i.e., guides. The Project would work within existing public international law framework. The objective would be to create new private international law tools that states and private parties can choose to adopt in order to drive decarbonisation and resilience.

The desirability of this project is that it ensures UNCITRAL’s texts and materials remain modern and relevant, and aligned with the direction of travel in global trade and investment – which is firmly toward decarbonisation over the next 10, 20, 30 years. And accordingly, to ensure that the best tools are available to all, including states and citizens with fewer legal resources and less expertise available to them at a time when these systems are resetting for a sustainable future.

In terms of resources, the Net Zero Lawyers Alliance, a coalition of 20+ commercial law firms across 40+ countries, has committed to assist states and private parties, by taking steps to examine how existing systems of commercial law might better align with climate change mitigation, adaptation and resilience goals. These firms work closely with international law associations, universities and states, as well as private sector and financial institutions. The NZLA is an accredited Accelerator initiative on the UNFCCC Race to Zero platform. Its members are able to provide the resources required for the fact gathering and factual analysis of existing instruments and innovation opportunities.

Working closely with member states, a detailed proposal of work could be presented to the Commission for consideration at its next session in 2022. The proposal would:

1. Based on factual and objective information, identify areas relevant for future work in UNCITRAL; and
2. Be prepared on an inclusive basis, consulting with States and stakeholders, to narrow down precisely which areas and texts might benefit from the greatest focus and attention.

Meanwhile.

In the meantime, the NZLA would offer its assistance to the Secretariat in activities to support technical assistance and capacity building activities on the use of existing texts. The alliance would also aim to assist developing countries in enabling their active participation in this exploratory work and if UNCITRAL takes up the project, and believe we would be contributing to raise awareness of UNCITRAL's activities in the field of international trade law.

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Examples of Potential Work:

1. Stocktake of existing texts:

The 2019 UNCITRAL Legislative Guide on Public-Private Partnerships (“Legislative Guide”) and the UNCITRAL Model Legislative Provisions on Public-Private Partnerships (“Model Legislative Provisions”) followed a thorough review of the pre-existing UNCITRAL Legal Guide on Drawing Up Construction Contracts (1988) and 2000 UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects and 2003 by the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects.

The 1988 Legal Guide originated from the UN General Assembly adoption of resolutions dealing with economic development and establishment of a new international economic order in 1974 and 1975. UNCITRAL was then called upon to take account of those resolutions and examine the legal implications of the new order. The Working Group identified that contractual provisions commonly occurring in international industrial development contracts would be of special importance to developing countries.

These guides are designed to be of use to parties involved at various levels of negotiating and drawing up international works contracts. They are of particular benefit to purchasers from developing countries. The Model Legislative Provisions are intended to assist in the establishment of a legislative framework favourable to public-private partnerships (“PPPs”). PPPs themselves cover a wide range of contractual arrangements between public authorities and private entities contributing to the private financing of public infrastructure in the broad sense. They are an important tool to meet national infrastructure needs and to achieve the Sustainable Development Goals, including SDG 13, climate action.

As the 2019 text is recent and comprehensive, the stocktake would be limited to climate mitigation, adaptation and resilience. It would focus on tools designed to level the playing field for developing states in a post-Covid reset for a global sustainable investment environment.

The stocktake would also take account of UNCITRAL’s ongoing work on the legislative front. For example, UNCITRAL is to take stock of recent developments in dispute resolution in the digital economy, including tools that have the potential to reduce the emissions arising from commercial dispute settlement procedures, bearing in mind concerns that have been raised as regards to potential to undermine inclusivity and transparency in the process.

## 2. New innovation for climate change related technology sharing

Climate change mitigation and adaptation goals require a sharing of technology. Predominantly owned by private sector, climate change related technology is usually subject to intellectual property rights (“IPR”). These are enforced internationally, including through private commercial law systems of contracts, licensing, pricing and dispute resolution. Using existing models as a precedent (e.g., Standard Essential Patents), a system of tools could be developed to offer standardised technology access, licensing terms, price formula (based on fair, reasonable and non-discriminatory pricing) and fair, efficient and effective dispute resolution. Such system could be integrated into IPR guidance in the PPP legislative guide, for example.

## 3. New innovation for Voluntary Carbon Markets

A recent Task Force on Scaling Up Voluntary Carbon Markets identified the need for contracts, rules and dispute resolutions procedures throughout the life cycle of a carbon unit from accreditation to retirement. This relates to the private and voluntary system of carbon markets that exists outside public international law framework and mechanisms. It primarily concerns carbon trading by non-state actors. An UNCITRAL-based set of tools offering modern and harmonised contracts and governing body rules, with robust, efficient and effective dispute resolution procedures, could assist to maintain integrity and provide critical guardrails to any scaled up voluntary carbon trading system, further ensuring that international trade instruments align with climate change mitigation goals..